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No. 06-1037

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD S. COOPER
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether proof that an employee benefit plan on its face requires older workers to be denied disability benefits available to younger workers or to receive fewer disability benefits than younger workers establishes a prima facie case of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-38a) is reported at 467 F.3d 571. The opinion of the panel of the court of appeals is reported at 424 F.3d 467. The order of the district court (Pet. App. 39a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2006. The petition for a writ of certiorari was filed on January 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC) brought suit against petitioners Kentucky Re-

tirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky, alleging that the KRS disability-retirement benefits plan discriminates on the basis of age in violation of the Age Discrimination Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. The district court granted summary judgment to petitioners, holding that the KRS plan does not discriminate on the basis of age because it is not based on denigrating stereotypes. Pet. App. 39a-47a. The court of appeals reversed, holding that the KRS plan is facially discriminatory, and that proof that a plan is facially discriminatory creates a prima facie case of age discrimination, without regard to whether the plan is based on animus against older workers. *Id.* at 1a-38a.

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). "The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). As amended by the OWBPA, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

2. The KRS plan offers normal retirement benefits to employees covered by the plan. Pet. App. 5a. Employees who work in hazardous positions are eligible for

normal retirement benefits at age 55 or after completing 20 years of service, while employees in nonhazardous positions are eligible for normal retirement benefits at age 65 or after 27 years of service. *Ibid.*; see Ky. Rev. Stat. § 61.559(2)(d) (Michie 2004); *id.* § 78.545(7) (1995).

The KRS plan also offers disability benefits. Pet. App. 5a. Under the plan, however, when workers become disabled after reaching the normal retirement age, they are disqualified from seeking disability retirement benefits. *Id.* at 6a. Consequently, a person working in a hazardous position who becomes disabled after reaching age 55 may receive only normal retirement benefits. *Ibid.* That benefit is generally calculated as 2.5% of the employee's final compensation times the number of years worked. *Ibid.*

Employees in a hazardous position who become disabled when they are under 55 and have less than 20 years of service are eligible for disability benefits. Pet. App. 6a. The amount of the benefit is calculated by adding to the number of years the employee actually worked the number of years remaining until the worker would have reached either normal retirement age or 20 years of service, but no more than the number of years already worked. *Ibid.*

The KRS plan also guarantees a hazardous duty employee who is eligible for disability retirement and becomes disabled in the line of duty monthly benefits of at least 25% of monthly final rate of pay. Pet. App. 7a. If such an employee has dependent children, the employee is entitled to a dependent-child benefit of 10% of monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of monthly final rate of pay. *Ibid.* Those benefits are not available to a

hazardous duty employee who becomes disabled after reaching normal retirement age. *Ibid.*

Under the KRS plan, the amount paid annually to a worker who retires on disability at a younger age will frequently exceed (and will never be less than) the annual benefits of a worker who retires due to disability at an older age, where every factor, other than age, that is relevant to determine an employee's benefits is identical. Pet. App. 8a. Moreover, in every case, a worker younger than normal retirement age who retires on disability will receive more benefits each year than an older employee who becomes disabled after reaching normal retirement age and retires from the same job, with the same disabling condition, length of service, and final compensation. *Ibid.*

3. Charles Lickteig was employed in a hazardous duty position by the Jefferson County Sheriff's Department, a participant in the retirement system operated by KRS. Pet. App. 4a. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. *Ibid.* KRS notified Lickteig that under Kentucky law, he was ineligible for disability retirement because he was over 55 and in a hazardous position. *Id.* at 4a-5a.

Lickteig filed a charge with the EEOC, alleging that he had been denied benefits because of his age. Pet. App. 5a. The EEOC sought to resolve Lickteig's discrimination charge through informal means, but those efforts proved unsuccessful. *Id.* at 10a. The EEOC then filed suit against petitioners KRS, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky, alleging that petitioners maintain an employee benefit plan that denies or pays fewer disability retirement benefits to older individuals because of age, in violation of

the ADEA. *Id.* at 2a. The EEOC sought declaratory, injunctive, and monetary relief for Lickteig and a class of similarly situated individuals who, because of age, were excluded from disability retirement, or applied for disability retirement and have received fewer annual benefits, since the effective date of the OWBPA. *Id.* at 9a-10a.

Petitioners moved to dismiss the suit on Tenth and Eleventh Amendment immunity grounds, but the district court denied the motion, and the court of appeals affirmed. Pet. App. 10a. On remand, the parties filed cross-motions for summary judgment. *Ibid.* Petitioners asserted both that the EEOC had not established a prima facie case of discrimination and that any such discrimination fell within the ADEA's statutory exceptions. *Id.* at 40a; see 29 U.S.C. 623(f)(2)(B)(i) and (ii).

The district court granted summary judgment to petitioners. Pet. App. 39a-47a. Relying on the Sixth Circuit's decision in *Lyon* v. *Ohio Education Ass'n*, 53 F.3d 135 (1995), the court concluded that while age is a factor in the KRS plan, the plan does not discriminate on the basis of age because it is not based on "denigrating stereotypes about age." Pet. App. 42a-43a.

4. A panel of the court of appeals affirmed. Pet. App. 10a. The panel expressed "concerns regarding the soundness of *Lyon's* reasoning," but "deemed itself bound by the *Lyon* decision. *Ibid.* The panel stated that "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan * * * in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." *Id.* at 11a.

5. The court of appeals granted rehearing en banc, reversed the district court's grant of summary judgment for petitioners, and remanded for further proceedings.

Pet. App. 1a-38a. The court held that the EEOC had "established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age." *Id.* at 3a. The court further ruled "that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging the policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim." *Ibid.* The court concluded "that *Lyon*'s standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans." *Ibid.* The court "therefore overrule[d] in part [its] previous decision in *Lyon*." *Ibid.*

In reaching those conclusions, the court of appeals relied on this Court's decisions in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). Pet. App. 15a-17a. The court of appeals explained that, under those decisions, a plan is facially discriminatory when it requires adverse treatment of older workers because of their age. *Id.* at 15a.

Applying that definition of facial discrimination, the court concluded that the KRS plan "is facially discriminatory on the basis of age in at least two ways." Pet. App. 16a. First, the KRS plan "categorically excludes" employees over age 55 from disability benefits that are available to younger employees who are "similarly situated in all relevant respects other than age." *Ibid.* Second, the KRS plan is facially discriminatory because "employees who become disabled when they are still

'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." *Id.* at 17a.

The court of appeals also relied on *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989). The court explained that "[t]he KRS plan's disqualification of employees age fifty-five and over for disability benefits closely resembles the characteristic of the plan in *Betts* that the Supreme Court found to be facially discriminatory," but subject to the exemption for benefit plans that existed before the ADEA was amended by the OWBPA. Pet. App. 18a. The "legislative history" of the OWBPA, the court added, "is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan." *Id.* at 19a. The court also noted that many other circuit courts had "reached conclusions contrary to *Lyon*." *Ibid.* (citing cases in which "the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations").

The court rejected petitioner's contention that the ADEA requires proof that a facially discriminatory plan is based on a discriminatory animus against older workers. Pet. App. 20a-21a. The court explained that, under *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), and *Hazen Paper*, "[o]nce a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." Pet. App. 20a.

Chief Judge Boggs dissented. Pet. App. 25a-38a. He concluded that the plan was lawful on the ground that "it considers age only in combination with years of service and years to retirement age," and that, in his view, did not facially discriminate on the basis of age. *Id.* at 26a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, because the case is in an interlocutory posture, petitioners' claims about the potential impact of the decision are speculative and premature. Further review is therefore not warranted.

1. On its face, petitioners' benefits plan treats older workers less favorably than younger workers because of their age. As the court of appeals explained, petitioners' plan is facially discriminatory in two ways. First, the plan categorically excludes workers who have reached the normal retirement age from eligibility for disability-retirement benefits, while affording such benefits to persons who become disabled before they reach normal retirement age. Pet. App. 2a. Second, the plan affords older workers who are eligible for disability-retirement benefits lower monthly benefits than younger workers who are similarly situated in every relevant respect except their age. *Ibid.*

Petitioners do not dispute that, in those two respects, their plan facially treats older workers less favorably than younger workers because of their age. Instead, they argue (Pet. 9-13) that the ADEA does not prohibit such age-based adverse treatment, absent proof that the difference in treatment is arbitrary. Petitioners further argue that age-based adverse treatment is arbitrary only when it is based on "inaccurate and stigmatizing

stereotypes." Pet. 18 (citation omitted). Petitioners' contentions are without merit.

As the text of the statute, this Court's decisions, and Congress's response to the *Betts* decision demonstrate, a benefits plan that facially treats older workers less favorably than younger workers because of their age violates the ADEA unless it falls within one of the ADEA's exceptions from the general prohibition against discrimination. There is no additional requirement that a plaintiff demonstrate that a facially discriminatory plan is animated by inaccurate or stigmatizing stereotypes.

a. Subject to certain specified exceptions, the ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). The plain language of that prohibition makes it unlawful for an employer to "treat some people less favorably than others because of their [age]." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (citation omitted). That basic test of discrimination is clearly satisfied when, as here, an employer relies "upon a formal, facially discriminatory policy requiring adverse treatment of [older] employees." *Id.* at 610. In such cases, the terms of the policy furnish direct evidence that "the employee's protected trait actually played a role in [the employer's decisionmaking process] and had a determinative influence on the outcome." *Ibid.* There is no need to demonstrate, in addition, that the employer relied on negative stereotypes in establishing the facially discriminatory policy.

The Court's decision in *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S.

187 (1991), is instructive. In that case, an employer excluded fertile women, but not fertile men, from certain lead-exposed jobs because of their sex. *Id.* at 190-192. The employer argued that the policy did not discriminate on the basis of sex because it was not based on a malevolent motive. The Court rejected that contention, explaining that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id.* at 199. The Court added that "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Ibid.*

Johnson Controls involved an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, rather than the ADEA. But its "interpretation of Title VII * * * applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (citation and internal quotation marks omitted). Thus, a benefits plan that on its face requires adverse treatment because of age contravenes the ADEA's general prohibition, without regard to the employer's subjective motivations for adopting that plan.

That does not mean that a plan that facially requires adverse treatment of older workers because of their age automatically violates the ADEA. The ADEA contains several exceptions that qualify that general prohibition. For example, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on be-

half of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). The ADEA also permits an employer to adopt a "voluntary early retirement incentive plan" that is consistent with the relevant purposes of the ADEA, 29 U.S.C. 623(f)(2)(B)(ii), and to deduct from long-term disability benefits the amount of pension benefits "for which an individual who has attained the later of age 62 or normal retirement age is eligible." 29 U.S.C. 623(*l*)(3). But absent proof of such a statutory exception, a plan that facially requires adverse treatment of older workers because of their age violates the ADEA.

b. This Court's Title VII decisions involving benefits plans confirm that benefits plans that facially require adverse treatment because of age fall within the ADEA's general discrimination prohibition, without regard to whether the discrimination is based on inaccurate and stigmatizing stereotypes. In *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the Court held that a retirement plan that paid equal monthly retirement benefits to similarly situated men and women, but required female employees to make larger monthly contributions to the pension fund violated Title VII. *Id.* at 705. The Court acknowledged that, in setting a higher contribution rate for female employees, the employer had not relied on "'stereotyped' impressions about the characteristics of males or females," or "a fictional difference between men and women." *Id.* at 707. Instead, the employer had based its decision on "a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men." *Ibid.* The Court held, however, that the employer's motives could not redeem a practice that "on its

face discriminated against individual employees because of their sex." *Id.* at 716.

Similarly, in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), the Court held that a retirement plan that paid women lower monthly benefits than men who deferred the same amount of compensation violated Title VII. The Court explained that in *Manhart* it had held that a plan requiring women to make greater contributions than men discriminates because of sex "for the simple reason that it treats each woman in a manner which but for her sex would have been different." *Id.* at 1081 (citation, internal quotation marks, and brackets omitted). The Court then concluded "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Ibid.*

The reasoning in *Manhart* and *Norris* is equally applicable here. Because petitioners' plan facially treats older workers less favorably than younger workers, it falls within the ADEA's general prohibition, without regard to whether that difference in treatment is grounded in inaccurate or denigrating stereotypes.

c. The Court's decision in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989), and Congress's response to the decision, reinforce that conclusion. Like the plan at issue in this case, the plan at issue in *Betts*, "[o]n its face," rendered employees "ineligible for disability retirement" once they reached a particular age. *Id.* at 166. The lower courts concluded that the plan fell within the ADEA's general prohibition against discrimination because of age, and did not fall within the then-existing exemption for bona fide benefit plans that were not a subterfuge to evade the purposes of the ADEA. *Id.* at 163-165. The Court did not take issue

with the lower courts' assessment that the plan fell within the ADEA's general prohibition. It held, however, that the plan fell within the exemption for bona fide benefit plans. The Court reasoned that the exemption encompassed any "bona fide benefit plan from the purview of the ADEA so long as the plan [was] not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177. An EEOC regulation had interpreted the exemption to apply only to "benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations," but the Court invalidated the regulation as "contrary to the plain language of the statute." *Id.* at 175.

In response to *Betts*, Congress enacted the OWBPA. The OWBPA eliminated the "subterfuge" language that had led the Court in *Betts* to invalidate the EEOC's regulation. In its place, the OWBPA codified the EEOC regulation's equal cost defense. 29 U.S.C. 623(f)(2)(B)(i). The purpose of the OWBPA is clear: "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." OWBPA § 101, 104 Stat. 978 (29 U.S.C. 621 note). Thus, as a result of the OWBPA, plans like the one at issue in *Betts* and at issue here that facially provide less benefits to older workers because of their age violate the ADEA, unless the employer can demonstrate that the age-based disparity in benefits is cost-justified, 29 U.S.C. 623(f)(2)(B)(i), or falls within the scope of another explicit statutory exemption, such as the exemption for early retirement incentive plans. 29 U.S.C. 623(f)(2)(B)(ii).

d. In arguing otherwise, petitioners rely (Pet. 11) on Section 621(b), which states that a purpose of the ADEA is "to prohibit arbitrary age discrimination in employment." Petitioners seek to derive from that abstract statement of purpose a rule that an age-based practice is not prohibited unless it reflects inaccurate and denigrating stereotypes. Pet. 18. In order to determine the type of age discrimination that Congress sought to eliminate as "arbitrary," however, a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate." *Betts*, 492 U.S. at 176. The ADEA's substantive prohibitions do not seek to eradicate "arbitrary age discrimination," 29 U.S.C. 621(b), by requiring a court to decide in each case whether a particular act of age discrimination reflects denigrating stereotypes. Instead, the substantive prohibitions seek to eradicate "arbitrary age discrimination" by making it unlawful for an employer to "discriminate" against an older worker "because of such individual's age," 29 U.S.C. 623(a)(1), unless the discrimination falls within one the ADEA's specified statutory exceptions, such as the exception for benefit plans that are justified by differences in cost. 29 U.S.C. 623(f)(2)(B)(i). Thus, an employment practice that facially treats older workers less favorably than younger workers because of their age, and does not fall within one of the statutory exceptions is, by definition, the kind of "arbitrary age discrimination" that the ADEA prohibits.

Petitioners' reliance (Pet. 18) on *Hazen Paper* is also misplaced. In that case, the Court held that a plaintiff could not establish dissimilar treatment by showing that an employment decision was based on a factor that merely correlates with age, such as an employee's

length of service. 507 U.S. at 608-609. The Court reasoned that in enacting the ADEA, Congress "was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," *id.* at 610, and that when an employer "is wholly motivated by factors other than age," that concern disappears "even if the motivating factor is correlated with age." *Id.* at 611 (emphasis omitted). The Court did not suggest, however, that when an employment practice is directly based on age, a plaintiff would have to establish that the practice is also motivated by inaccurate and stigmatizing stereotypes. To the contrary, the Court reaffirmed the settled Title VII and ADEA principle that disparate treatment is established when a plaintiff can show that an employer has "relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with [a protected] trait." *Id.* at 610. That settled principle is controlling here.

2. There is no conflict in the circuits on the question presented in this case. Every other court of appeals that has considered the question has reached the same conclusion as the court below. See *Jankovitz* v. *Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005) (holding that a benefit plan that rendered an employee over the age of 65 ineligible for early retirement benefits was "discriminatory on its face"); *Abrahamson* v. *Board of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 72-73 (2d Cir. 2004) (holding that an early retirement incentive plan that limited eligibility based on a combination of age and years of service established a "prima facie case of age discrimination under the ADEA"); *Arnett* v. *California Pub. Employees Ret. Sys.*, 179 F.3d 690, 695-696 (9th Cir.

1999) (holding that a formula for calculating disability retirement benefits by awarding the lesser of 50% of final pay or the amount the employee would have received in service retirement benefits had he continued to work to normal retirement age "stated a disparate treatment claim" under ADEA), vacated on other grounds, 528 U.S. 1111 (2000); *Auerbach* v. *Board of Educ. of the Harborfields Cent. Sch. Dist.*, 136 F.3d 104, 109-114 (2d Cir. 1998) (holding that a retirement incentive plan that provided additional benefits for teachers who retired at the age they first became eligible "established a *prima facie* case of age discrimination"); *Huff* v. *UARCO*, 122 F.3d 374, 387-388 (7th Cir. 1997) (holding that an early retirement plan that denied an option to receive a lump-sum payout of pension contributions to employees once they became eligible for early retirement at age 55 with 10 years of service drew "an express line between workers over [55] and those under" and therefore stated an ADEA claim "of disparate treatment"); *Solon* v. *Gary Cmty. Sch. Corp.*, 180 F.3d 844, 855 (7th Cir. 1999) (holding that early retirement incentive plans that excluded employees over 62 were "discriminatory on their face" and that "independent proof of an illicit motive [was] unnecessary"). Indeed, as the en banc court explained, the Sixth Circuit's decision to overrule its prior decision in *Lyon* fostered accord, not conflict, among the circuits. See Pet. App. 19a-20a.

3. Nor is there any other basis for granting review in this case. Petitioners assert (Pet. 19) that the decision below will have a substantial impact on state retirement programs. But the decision below simply held that the EEOC established a prima facie case of discrimination by showing that petitioners' plan facially discriminates because of age. The court of appeals did not rule

on petitioners' claim that the plan's reduced benefits to older workers is justified under the statutory exemption in 29 U.S.C. 623(f)(2)(B)(i). Petitioners are free to press that claim on remand. Because liability has yet to be determined, any consideration of a potential impact of the decision below is speculative and premature. The interlocutory posture of the case therefore counsels against granting certiorari. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of a writ of certiorari).

Furthermore, in the event petitioners are found liable on remand, the appropriate remedy would be subject to equitable considerations. See *Manhart*, 435 U.S. at 718-723. For that reason as well, the impact of the court of appeals' decision on petitioners' plan cannot be assessed until proceedings on remand have been completed, and the interlocutory posture of the case therefore counsels against further review.

Petitioners' claim about the potential impact of the decision also ignores the efforts that Congress made in the OWBPA to minimize the impact of that legislation on state plans. Because the decision in *Betts* concerned a state-sponsored benefit plan for public employees, Congress was aware that the ADEA, as amended by OWBPA, would require adjustments to such plans. Congress sought to accommodate the States' needs through several provisions. First, Congress enacted "a special rule authorizing" state and municipal employers to offer existing employees the opportunity to "make a one-time election to retain coverage under the old plan for disability benefits or to be covered under new disability benefits that conform to the amendments made by this bill." *Explanation of S. 1511*, 136 Cong. Rec. 27,060 (1990); see OWBPA § 105(c)(2), 104 Stat. 981 (29 U.S.C.

623 note). Second, Congress gave state and local governments "two years from the date of enactment to bring their plans into compliance," while private employers with existing plans that were not subject to collective bargaining had "180 days to be brought into compliance." 136 Cong. Rec. at 27,060; see OWBPA § 105(a) and (c)(1), 104 Stat. 981 (29 U.S.C. 623 note). And third, in response to "[s]ome States" that had "indicated a lack of familiarity with actuarial practices that are well-established in the private sector," 136 Cong. Rec. at 24,607 (statement of Sen. Pryor), Congress directed the EEOC and other federal agencies, upon request, to "provide assistance to state and local governments in identifying and securing independent technical advice to assist in complying" with the new legislation. *Id.* at 27,060; see OWBPA § 105(c)(3), 104 Stat. 982 (29 U.S.C. 623 note).

Congress's actions demonstrate both that petitioners' claim about the potential impact of this case are overstated and that Congress was sensitive to the financial and related burdens faced by public employers in state-sponsored public benefit plans. There is no reason for the Court to grant certiorari in this case and reconsider the balance struck by Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD S. COOPER
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission

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